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A Response to Bebchuk and Jackson's
Toward a Constitutional Review of the Poison Pill

In a recent [paper](#), Professors Lucian Bebchuk and Robert Jackson have extended Professor Bebchuk's extreme and eccentric campaign against director-centric governance into a new realm—that of the Constitution of the United States. They claim that “serious questions” exist about the constitutionality of the poison pill—or, more precisely, “about the validity of the state-law rules that authorize the use of the poison pill.” It is likely, they argue, that these state-law rules violate the Supremacy Clause of the Constitution, and are thus preempted, because they frustrate the purposes of the Williams Act, the 1968 federal statute that governs tender-offer timing and disclosure.

Bebchuk and Jackson cite leading academic textbooks and articles that either recognize the preeminence of the poison pill in takeover defense or demonstrate the weakness of preemption challenges to state takeover statutes. The scholars authoring these books and articles, we are told, “overlooked” or “ignored” the obvious fact that poison pills may delay tender offers for lengthy periods of time. Bebchuk and Jackson profess “surpris[e]” that the constitutional issue they discuss “has received little attention, or even notice, from commentators,” and assert that it is rather a shocking “oversight” that, despite a “large literature” on Williams Act preemption, “commentators and practitioners” have devoted “little attention to the question of whether the state-law rules with the most powerful antitakeover effect—the rules authorizing use of the poison pill—are preempted.”

And, as far as courts are concerned, Bebchuk and Jackson claim that their discovery of the pill's unconstitutionality is utterly brand new: “litigation based on ... a claim” that “state-law poison-pill rules may well be preempted has not yet been pursued.” Bebchuk and Jackson definitively declare that “*no court* has ever expressly considered a preemption challenge to the validity of state-law poison-pill rules.” (Emphasis added.) It is for this reason, they insist, that “the courts have not yet resolved” the question. Were a preemption challenge to the poison pill to be brought now for the first time, they argue, courts would likely look to whether the pill permits “tender offerors ... a meaningful opportunity to successfully acquire the target and whether shareholders are given an opportunity to evaluate the merits of tender offers.” This test, they posit, the pill would fail.

Bebchuk and Jackson's paper is tendentious and misleading—and, in material respects, simply wrong. It is not a work of serious scholarship. It is an attempt at advocacy, but fails even at that. From their paper, a reader would never know

- that, in 1985, in the landmark *Household* litigation that established the validity of the poison pill, the Delaware Supreme Court [expressly rejected](#) the plaintiff's argument that, were it construed to allow the pill, Delaware law would be preempted by the Williams Act;
- that, in an important [decision](#) in 1995, the United States Court of Appeals for the Fourth Circuit rejected a bidder's preemption challenge to a statute that not only

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authorized poison pills, but also cloaked directors' decisions regarding pills with the powerful protections of a traditional, plain-vanilla, no-heightened-scrutiny business-judgment rule;

- that this Fourth Circuit decision not only explicitly rejected Bebchuk and Jackson's "meaningful opportunity" standard, but also held that a state's "decision to allow management access to a set of defensive mechanisms in the takeover situation"—including, and especially, the pill—in no way "frustrates the Williams Act's goal of investor protection," and is thus not preempted, even if those defensive mechanisms "work to give target management an advantage in the tender offer context";
- that, in the [leading decision](#) addressing Williams Act preemption challenges to state antitakeover laws, the United States Court of Appeals for the Seventh Circuit, in an opinion by Judge Frank Easterbrook, rejected such a challenge in part because "*firms issue and state law enforces poison pills*" and other "devices [that] make tender offers unattractive ([or] even impossible)"—and stated that "*[n]one of these devices could be thought preempted by the Williams Act*";
- that, in the same decision, the Seventh Circuit held that "rules governing the internal affairs of corporations ... are not preempted by the Williams Act," that "investors have no right to receive tender offers," and that, "[m]ore to the point[,] ... the Williams Act does not create a right to profit from the business of making tender offers";
- that the Seventh and Fourth Circuit decisions represent the law on Williams Act preemption today; and
- that the district court decisions from which Bebchuk and Jackson derive their "meaningful opportunity" standard are based upon an overly expansive and now discredited view of Williams Act preemption that commanded the support of, at most, only three members of the Supreme Court some 32 years ago.

Bebchuk and Jackson's article thus conveys a fanciful vision of Williams Act preemption standards that in no way reflects the true state of the law today. To set the record straight, we set forth here a short history of Supremacy Clause challenges to takeover statutes and to the poison pill.

The Supremacy Clause, the Williams Act, and the Act's History and Purpose

The Constitution's Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It thus renders a state law ineffective—preempted—whenever that law conflicts with a federal statute.

Whether state law is preempted by federal law turns on Congress’s intent and purpose in enacting the federal law. Preemption can occur in several ways. Congress can expressly preempt state law by explicitly barring state law from applying to a particular matter. State law can also be impliedly preempted. Implied preemption occurs when a state law directly conflicts with federal law—when it is impossible to comply with the requirements of both state and federal law. It also occurs when federal law has so occupied the field, so pervasively regulated a particular subject, that application of state law must be precluded. Finally, implied preemption occurs when a challenged state law “stands as an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress.”

It is on this last prong of preemption that Bebchuk and Jackson hang their hats. They argue that, in enacting the Williams Act in 1968, Congress sought to “give tender offerors a ‘meaningful opportunity for success,’” and to “set[] a floor”—a *substantive* floor—“for the level of protection shareholders must receive in connection with tender offers.” As a result, they say, “current state-law poison pill rules” should be declared preempted because “these rules give hostile offerors *no* practical opportunity for success,” as “they allow incumbents to block a hostile offer from shareholder consideration for long periods of time,” and because the “state-law rules today empower directors to adopt arrangements that permit incumbents, rather than investors, to decide whether shareholders may accept a tender offer.”

These arguments are premised upon a gross overreading of the Williams Act. The Williams Act does *not* give hostile offerors a substantive right to have their offers succeed, and does not even give shareholders a right to receive such offers. And it does not remotely betray any intent to overturn any state law, statutory or decisional, that addresses the fiduciary duties of directors in matters relating to corporate control—or, for that matter, any *substantive* aspect of the relationships among shareholders, directors, and the corporation.

To the contrary, the Williams Act was a simple and narrow law. It was also commendably short, barely over four pages long; so that the reader can see it for himself or herself, we link to it [here](#). It regulates only the *process* of tender offers. It thus addresses the disclosures that offerors must make, and when they must make them. It addresses the timing of offers—how long stockholders must have to withdraw their tendered shares. It addresses the terms of permissible offers, requiring bidders to pay the same price to all tendering shareholders, and requiring, in the event of oversubscription in partial offers, purchases to be prorated among all who tendered shares. Finally, the law contains a broad antifraud provision governing disclosures and practices in connection with tender offers.

Just as nothing in the law’s text suggests that state fiduciary-duty law is to be disturbed, nothing in the legislative history does either. That history is also short and clear; for the reader’s convenience, we have posted the relevant House and Senate reports [here](#) and [here](#). The legislative history makes clear that Congress in 1968 was concerned with unfair tactics of hostile offerors—in particular, the then-burgeoning practice of “Saturday night special” tender offers, by which bidders would suddenly launch a quickly expiring offer over a weekend in order to coerce and stampede shareholders into tendering. As the Supreme Court explained in [Piper v. Chris-Craft Industries](#), quoting the floor statement of a Senate cosponsor:

The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies. That tender offerors were not the intended beneficiaries of the bill was graphically illustrated by the statements of Senator Kuchel, cosponsor of the legislation in support of requiring takeover bidders, whom he described as “corporate raiders” and “takeover pirates,” to disclose their activities.

“Today there are individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management *or shareholders* having any knowledge of the acquisitions. . . . The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company.”

Despite this overarching concern about “corporate raiders” and “takeover pirates” engaging in “financial rape[.]” under a “cloak of secrecy,” Congress nevertheless was, as the Court put it in *Piper*, “plainly sensitive to the suggestion that the measure would favor one side or the other in control contests.” And that is why Congress chose to pass only a limited measure governing the *process* of tender offers—in particular, *disclosure*. As the Court in *Piper* explained, the Williams Act’s sponsors

made it clear that the legislation was designed solely to get needed information to the investor, the constant focal point of the committee hearings. Senator Williams articulated this singleness of purpose, even while advocating neutrality:

“We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. *S. 510 is designed solely to require full and fair disclosure for the benefit of investors.*”

In short, as the Supreme Court explained in *Rondeau v. Mosinee Paper Corp.*, “[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.” As a result, nothing about the Williams Act suggests that Congress intended in any way to regulate or restrict the substantive powers of directors to respond to takeover bids, or to otherwise displace the state law that controls a corporation’s internal affairs. To the contrary, as far as those matters were concerned, and apart from matters of disclosure, Congress sought to be neutral and evenhanded—it chose to leave the balance between targets and bidders, as established by state law, *alone*.

Justice White’s Misreading of the Williams Act in *Edgar v. MITE Corp.*

In arguing the contrary, Bebchuk and Jackson rely on an opposing view of the Williams Act that was suggested over 30 years ago by only three Justices of the Supreme Court—a view that has *never* commanded a majority. In 1982 in *Edgar v. MITE Corp.*, the Supreme Court addressed a constitutional challenge, under the Commerce and Supremacy

Clauses, to a so-called “first generation” takeover statute. The challenged Illinois law prohibited tender offers for the shares of any firm with substantial shareholdings in Illinois unless the offer were approved as fair by the Illinois secretary of state. The Seventh Circuit had struck the law as both violating the Commerce Clause and preempted by the Williams Act.

By a vote of 6 to 3, the Supreme Court affirmed—but *only* reached the Commerce Clause challenge. The Court did *not* render any holding on the Williams Act preemption claim. In an opinion on behalf of only himself, Chief Justice Burger, and Justice Blackmun, however, Justice White wrote that, in his view, the Illinois law conflicted with the Williams Act and thus violated the Supremacy Clause as well. Expressing an expansive view that Bebchuk and Jackson today seek to resurrect, Justice White argued that the “policy of neutrality” and “evenhandedness” embodied in the Williams Act meant that “Congress intended to strike a balance [among] the investor, management, and the takeover bidder.” In other words, Justice White argued that Congress intended to strike and enforce its *own* evenhanded balance between targets and bidders—and not simply that Congress sought to be neutral and evenhanded as to the balance already struck by *state* law. Justice White’s view represents a stunningly capacious, and ultimately insupportable, view of the purposes of the Williams Act: as one court of appeals later crisply explained, “it is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations.”

Six Justices in *MITE* did not join in Justice White’s leap. Three Justices declined to address the merits at all, finding the case nonjusticiable because it was either moot or unripe. One Justice declined to address preemption because it was unnecessary to do so in light of the Court’s Commerce Clause holding. Two Justices, however, squarely rejected Justice White’s idiosyncratic interpretation of the Williams Act. Justice Stevens refused to join that approach because he was “not persuaded ... that Congress’ decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management.” And Justice Powell “agree[d] with Justice Stevens that the Williams Act’s neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.”

Even though Justice White’s views of the Williams Act failed to convince a majority, bidders and others immediately seized on those views to launch further attacks on other takeover laws and defensive measures. In fact, in 1984, in *Moran v. Household International, Inc.*—the landmark Delaware litigation establishing the validity of the poison pill—the plaintiffs, citing Justice White’s opinion, [expressly argued](#) in both the Delaware Court of Chancery and the Delaware Supreme Court that, were it construed to authorize the pill, Delaware law would be preempted by the Williams Act because it would “upset[] the neutrality between a tender offeror and target management which Congress sought to establish through the Williams Act.” The plaintiffs even received support from an amicus brief filed by the Securities and Exchange Commission, which stopped short of arguing that Delaware law would be preempted, but nonetheless asserted that the pill was “a practice more extreme than” takeover statutes and would “frustrate the shareholder choice that Congress and the Commission have viewed as being in the shareholder interest.” For its part, in its seminal decision, [the Delaware Supreme Court rejected the preemption challenge to the pill](#), and held that the directors’ actions in approving the pill

“provide[d] an insufficient nexus to the state for there to be state action which may violate the ... Supremacy Clause.”

Second-Generation Takeover Laws Are Upheld:
CTS Corp. v. Dynamics Corp. of America

Justice White’s commodious view of the Williams Act’s preemptive scope fared no better with his colleagues in [CTS Corp. v. Dynamics Corp. of America](#), a 1987 decision that represents the Supreme Court’s only other encounter with takeover defense. *CTS* presented Commerce Clause and Supremacy Clause challenges to a “second generation” takeover statute—an Indiana statute that provided that a bidder’s shares lose their voting power unless either the target’s directors approved the acquisition, or the target shareholders not affiliated with the bidder or management did so. The Seventh Circuit struck down this law as well, again on both Commerce Clause and preemption grounds.

This time, however, the Supreme Court reversed, and upheld the statute by a 6-to-3 vote. Justice White dissented—and was the *only* Justice who argued that the Indiana law was preempted. Justice Powell’s opinion for the Court squarely rejected the preemption claim. In doing so, the Court pointedly noted that Justice White’s “opinion in *MITE* did not represent the views of a majority of the Court”—that it was joined “*only* by Chief Justice Burger and by Justice Blackmun,” and that “[t]wo Justices disagreed with Justice White’s conclusion.” As a result, the Court emphasized, “we are not bound by its reasoning.” The *CTS* Court nevertheless applied its understanding of Justice White’s approach in *MITE* for the sake of argument—and found that “the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by Justice White in *MITE*.” As a result, in rejecting the bidder’s preemption argument in *CTS*, the Court did not issue a definitive holding on the Williams Act’s overall preemptive scope.

Still, the Court’s opinion in *CTS* made a number of statements that made clear its skepticism about expansive Williams Act preemption—and in particular, its respect for the states’ historic and traditional prerogative in establishing principles of corporate law. “[I]f it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer,” the Court observed, “the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity.” As examples, the Court cited staggered boards and cumulative voting—both of which could serve to “delay ... the ability of offerors to gain untrammelled authority over the affairs of the target corporation.”

All of this strongly cut *against* preemption, in the Court’s view:

The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. [Emphasis added.]

And, quite notably, the Court in *CTS* also observed that the Indiana statute was designed to protect shareholders against coercive tender offers in which stockholders are forced to tender for fear of receiving diminished value in a back-end, second-step transaction. That aim,

the Court noted, was quite consonant with, and not contrary to, the policies underlying the Williams Act:

The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection. [Emphasis added.]

Williams Act Preemption After *CTS*: the “Meaningful Opportunity” Test

Given the Supreme Court’s obvious misgivings about preemption of state corporate law, virtually all Williams Act preemption challenges to takeover statutes thereafter *failed*—other than those involving first-generation state takeover statutes, or state statutes imposing [disclosure obligations](#) that specifically “intrude[d] upon” the Williams Act’s scheme “for regulating disclosure” and thus created “an ‘actual conflict between federal and state law’” on “disclosure regulation.”

Most of the post-*CTS* cases involved challenges brought in 1988 and 1989 to “third generation” takeover statutes, such as Section 203 of the Delaware General Corporation Law. Generally speaking, these third-generation takeover statutes—also known as “business combination” laws—prohibit a would-be acquirer from engaging in a back-end merger with a target if the acquirer purchases a certain threshold percentage of the target’s stock without first obtaining the approval of the target’s board. These laws were consistently found to be consonant with the Williams Act and thus constitutional.

Some courts reached this conclusion by following the approach that the Supreme Court took in *CTS*: they assumed the validity of Justice White’s capacious view of the Williams Act, but found the preemption claims to be meritless anyway. Thus, for example, in a leading case addressing Delaware’s Section 203, [RP Acquisition Corp. v. Staley Continental, Inc.](#), the federal district court in Delaware applied Justice White’s “‘broad interpretation’” “for the sake of argument,” and, given its conclusion that “Section 203 survives [that] standard,” saw no need to “explore what narrower standard the *CTS* court might have approved.” *RP Acquisition*, and other district court cases like it, went on to apply a standard that Bebchuk and Jackson now argue should doom the poison pill—the “meaningful opportunity for success” test. The third-generation laws were not preempted by the Williams Act, these courts held, because hostile bidders still had a meaningful opportunity for success.

Judge Easterbrook’s Landmark Opinion in *Amanda Acquisition v. Universal Foods*

But these cases, decided in 1988 and 1989, did not provide the final word on the question of Williams Act preemption. To the contrary, that word comes from two seminal court of appeals decisions that decisively *rejected* the “meaningful opportunity for success” test—and effectively put to rest Justice White’s erroneous view of the Williams Act. These appellate decisions leave no doubt today that state laws governing poison pills are entirely constitutional. Indeed, both of the decisions so stated, and one of the two expressly so held.

The first was the Seventh Circuit’s powerful decision in 1989 in [*Amanda Acquisition Corp. v. Universal Foods Corp.*](#)—a case that our Firm briefed, argued, and won. *Amanda Acquisition* rejected a bidder’s constitutional challenges to Wisconsin’s third-generation takeover law. Interestingly enough, the opinion’s author was none other than Judge Frank Easterbrook—a former University of Chicago law professor who, as a corporate law scholar, had published an [article](#) that directly attacked [our Firm’s views](#) on the role that directors should and must properly play in protecting companies from hostile takeover bids. Then-Professor Easterbrook’s article famously took the extreme position that directors’ fiduciary duties should prohibit any and all defensive tactics, and instead should require directors to be entirely passive in response to all hostile bids. Needless to say, he was no friend of takeover statutes, or of the pill. In fact, in *Amanda Acquisition* itself, as a matter of policy, he strongly criticized both.

But even Judge Easterbrook recognized that the Williams Act, and the Constitution, did nothing to preclude them. “Skepticism about the wisdom of a state’s law,” he wrote, “does not lead to the conclusion that the law is beyond the state’s power.” Reviewing *MITE* and *CTS*, he noted that “[p]reemption has not won easy acceptance among the Justices for several reasons.” Among these, he explained, was “the traditional reluctance of federal courts to infer preemption of ‘state law in areas traditionally regulated by the States.’” That reluctance was of particular significance here, he observed, because “[s]tates have regulated corporate affairs, including mergers and sales of assets, since before the beginning of the nation.”

As for the Williams Act, Judge Easterbrook’s opinion for the Seventh Circuit went on to observe that, “[t]o say Congress wanted to be neutral between bidder and target ... is not to say that it also forbade the states to favor one of these sides.” “Nothing in the Williams Act says that the federal compromise among bidders, targets’ managers, and investors is the only permissible one.” “Every law has a stopping point,” the court added, and the Williams Act’s stopping point was that it merely “regulates the *process* of tender offers: timing, disclosure, proration if tenders exceed what the bidder is willing to buy, best-price rules.” And that was why, Judge Easterbrook explained, the Supreme Court had upheld the Indiana second-generation vote-sterilization provision that was at issue in *CTS*: in the Williams Act, “Congress said nothing about the voting power of shares acquired in tender offers.”

Most importantly, the Seventh Circuit explained how *CTS* made clear that the Williams Act could not be deemed to preempt state laws “governing the internal affairs of corporations,” no matter what effect those laws might have on takeover bids:

CTS observed that laws affecting the voting power of acquired shares do not differ in principle from many other rules governing the internal affairs of corporations. Laws requiring staggered or classified boards of directors delay the transfer of control to the bidder; laws requiring [a] supermajority vote for a merger may make a transaction less attractive or impossible. Yet these are not preempted by the Williams Act, any more than state laws concerning the *effect* of investors’ votes are preempted by the portions of the Exchange Act regulating the process of soliciting proxies. Federal securities laws frequently regulate process while state corporate law regulates substance. Federal proxy rules demand that firms disclose many things, in order to promote informed voting. Yet states may permit or compel a supermajority rule (even

a unanimity rule) rendering it all but impossible for a particular side to prevail in the voting. Are the state laws therefore preempted?

The court went on to list other defensive practices and devices that were permissible under state law and simply could not “be thought [to be] preempted by the Williams Act or the proxy rules.” *The list included **poison pills***:

How about state laws that allow many firms to organize without traded shares? Universities, hospitals, and other charities have self-perpetuating boards and cannot be acquired by tender offer. Insurance companies may be organized as mutuals, without traded shares; retailers often organize as co-operatives, without traded stock; some decently large companies (large enough to be “reporting companies” under the ’34 Act) issue stock subject to buy-sell agreements under which the investors cannot sell to strangers without offering stock to the firm at a formula price; Ford Motor Co. issued non-voting stock to outside investors while reserving voting stock for the family, thus preventing outsiders from gaining control (dual-class stock is becoming more common); ***firms issue and state law enforces poison pills***. *All of these devices make tender offers unattractive (even impossible) and greatly diminish the power of proxy fights, success in which often depends on buying votes by acquiring the equity to which the vote is attached. **None of these devices could be thought preempted by the Williams Act or the proxy rules***. If they are not preempted, neither is [Wisconsin’s takeover law]. [Emphasis added.]

Judge Easterbrook concluded that “[o]nly if the Williams Act gives investors the right to be the beneficiary of offers could Wisconsin’s law run afoul of the federal rule.” But this interpretation was entirely a nonstarter: “No such entitlement can be mined out of the Williams Act.” Indeed:

Investors have no right to receive tender offers. More to the point ... the Williams Act does not create a right to profit from the business of making tender offers.

As a result, the court concluded that “events leading bidders to cease their quest do not conflict with the Williams Act any more than a state law leading a firm not to issue new securities could conflict with the Securities Act of 1933.” Because “Wisconsin leaves [the tender offer] process alone,” the Seventh Circuit concluded, “its law may co-exist with the Williams Act.” The bidder petitioned for certiorari in *Amanda Acquisition*, but the Supreme Court refused to hear the case.

The Fourth Circuit in *WLR Foods*: A Williams Act Challenge to the Pill Is Explicitly Rejected

When *Amanda Acquisition* came down, [we wrote to our clients](#) that *Amanda Acquisition* “should end constitutional doubts” about state takeover laws that addressed the internal governance of domestic corporations. That prediction turned out to be quite accurate. So trenchant was the Seventh Circuit’s analysis, that constitutional challenges to such takeover laws virtually ceased after *Amanda Acquisition*. Nonetheless, one of the very few post-*Amanda*

challenges actually resulted in another important court of appeals decision—one that explicitly addressed and rejected a preemption challenge to the poison pill.

That decision came from the Fourth Circuit in 1995. [*WLR Foods, Inc. v. Tyson Foods, Inc.*](#) presented a constitutional challenge to four Virginia statutes. According to the bidder, Tyson Foods, the four laws, operating together, “impermissibly restrict[ed] the ability of a bidder to effect a takeover of a Virginia corporation.” Two of the statutes were takeover laws—one, a second-generation vote-sterilization statute akin to the Indiana law upheld in *CTS*, and the other, a third-generation business-combination law resembling the Wisconsin statute affirmed in *Amanda Acquisition*.

The third challenged provision was Virginia’s “Poison Pill Statute,” [Va. Code Ann. § 13.1–646](#). That law explicitly authorizes Virginia corporations to create shareholder rights plans. It also provides that “[a]ny action or determination by the board of directors with respect to the issuance, the terms of or the redemption of [a rights plan] shall be subject to the provisions of § 13.1–690 and shall be valid if taken or determined in compliance therewith.” In turn, [Section 13.1–690](#), referred to in the pill statute, was the fourth provision challenged by Tyson. And it was none other than Virginia’s codification of the business judgment rule—not the modern Delaware version, but rather the traditional, historic, pre-*Unocal*, pure business-judgment rule, which protects directors from liability for any good faith business judgment, without regard to whether it involves matters of corporate control, and with no heightened scrutiny for those matters.

Thus, by challenging both Virginia’s statute authorizing pills and its no-heightened-scrutiny business-judgment rule as it applies to pills, Tyson brought the very challenge that Bebchuk and Jackson now erroneously say has never been brought: to borrow words from their article, the court in *WLR Foods v. Tyson Foods* “expressly considered a preemption challenge to the validity of state-law poison-pill rules.” What is more, the preemption challenge in *WLR Foods* could not have been made in a posture more favorable to Bebchuk and Jackson’s position: not only were the Virginia “state-law poison-pill rules” challenged in conjunction with two potent antitakeover laws, but those “state-law poison-pill rules” were also considerably more forgiving of directors than Delaware’s, as the Virginia regime commands the application of the pure, traditional, no-heightened-scrutiny business-judgment rule. No better test case for Bebchuk and Jackson’s thesis could possibly be found.

Yet both the district court and the court of appeals in *WLR Foods* rejected the preemption claim. And quite emphatically so. Quoting *Amanda Acquisition*, the Fourth Circuit held that “[n]othing in the Williams Act says that the federal compromise among bidders, targets’ managers, and investors is the only permissible one.” As a result,

Congress did not forbid the result that Virginia has achieved with the statutory scheme in the instant case. The fact that Congress, when it created the Williams Act, did not intend to create an advantage for target management in the takeover situation, does not necessarily mean that Congress meant to prevent the states from allowing management an advantage which is not unfair to investors.

And so the Fourth Circuit concluded that the Virginia statutory scheme was necessarily constitutional, because it did not interfere with the Congress’s effort through the Williams Act to provide shareholders with additional disclosure:

The means by which the Williams Act achieves its purpose of protecting investors is by requiring disclosure of information in order to allow shareholders to make an informed decision and to prevent coercion in the tender offer context; Tyson has not shown that the Virginia statutes controvert the purpose of the Williams Act by removing protection from investors, for example, by keeping information from the shareholders. In fact, Tyson has not shown that the shareholders in this case were deprived of any relevant information. The goal of neutrality between bidder and target, emphasized by Tyson, is not so central to the purpose of the Williams Act that the Act should be held to preempt a group of state statutes that regulate the balance between a target and a bidder, but do not disadvantage the shareholders or prevent them from gaining access to pertinent information.

In so holding, the Fourth Circuit went on to disapprove the “meaningful opportunity for success” test that had been suggested by some earlier district-court decisions, and that, decades later, *Bebchuk* and *Jackson* now seek to exhume. The court of appeals cogently explained why this test lacked any foundation in the Williams Act:

We, like the district court, reject the meaningful opportunity for success test. As stated above, the purpose of the Williams Act is to protect independent investors from bidders and management by ensuring that the investors have access to information. The statute does not, however, have as an independent purpose the creation of an environment for bidders that is conducive to takeovers. Tyson attempts to use the “meaningful opportunity for success” test to shift the focus of the Williams Act from protection of investors to protection of bidders. However, the Williams Act is simply not designed to protect a company in Tyson’s position; “the Williams Act does not create a right to profit from the business of making tender offers.”

The four Virginia statutes may work to give target management an advantage in the tender offer context. The preemption question we address here, however, is whether Virginia’s decision to allow management access to a set of defensive mechanisms in the takeover situation frustrates the Williams Act’s goal of investor protection. We hold that it does not. [Emphasis added.]

And with that, the court of appeals dispensed with Tyson’s claim that Virginia’s director-friendly poison-pill rules were preempted by the Williams Act. As in *Amanda*, the bidder petitioned for certiorari—and once again, the Supreme Court refused to take the case.

Conclusion

Bebchuk and *Jackson* are wrong that to say that the pill has never been argued to violate the Supremacy Clause, and wrong to say that no court has ever addressed such a preemption challenge. But they are right that “commentators and practitioners” have devoted “little attention” to the question of the pill’s constitutionality. The reason for this is the same

reason that preemption challenges to state takeover laws virtually disappeared a quarter-century ago: those challenges are utterly meritless. They are meritless because the Williams Act governs procedure, not substance; disclosure, and not fiduciary duties; and because it evinces no Congressional intent, explicitly or implicitly, to supplant the states' historic authority to set rules governing the internal affairs of corporations that the states themselves have created. [As we argued in our brief in *Amanda* some 25 years ago](#), the “protection [of investors] is achieved in the Williams Act through *disclosure*, not through obliteration of the internal affairs doctrine or of the role of directors in corporate governance.” And at the end of the day, [as we explained almost 30 years ago in our brief in *Household*](#), the arguments for preemption prove too much—they would extensively “federalize matters traditionally committed to state law,” and “would render constitutionally suspect all of the judicial decisions upholding corporate steps [that] block takeover attempts.”

There has never been any doubt, and never will be: The pill, and the state-law doctrines permitting it, entirely comport with the Williams Act and the Constitution of the United States.

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